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No. 92-1864

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

BOBBY C. AKRIDGE, SR., *et al.*,

Petitioners,

versus

AMBAC INDEMNITY CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

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BRIEF OF RESPONDENT AMBAC INDEMNITY CORPORATION IN OPPOSITION

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QUESTION PRESENTED

Contrary to petitioners' statement, no federal constitutional question is properly presented in this case. The proceedings below were presented and decided on state law grounds. Therefore, there is no federal question properly presented for this Court's consideration.

PARTIES

The following is a list of all parties to the proceedings below (which was omitted from the Petition):

Petitioners, all citizens and taxpayers of Berrien County, Georgia, are Bobby C. Akridge, Sr.; J. D. (Donnie) Brogdon; Marion Harpe; Randy McGill; Rusty Darby; and Wayne Barker. Petitioners were plaintiffs in the trial court and appellees in the Supreme Court of Georgia.

Respondent is AMBAC Indemnity Corporation.[1] Respondent intervened as a defendant in the trial court and was appellant in the Supreme Court of Georgia.

The Berrien County Board of Commissioners and the Berrien County Tax Commissioner were named as defendants in the trial court but did not participate in the appeal to the Supreme Court of Georgia.

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[1]In accordance with Sup. Ct. Rule 29.1, respondent provides the following list of its parent companies and subsidiaries (except wholly owned subsidiaries): AMBAC Inc.

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In The

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BOBBY C. AKRIDGE, SR., *et al.*,

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AMBAC INDEMNITY CORPORATION,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Georgia

BRIEF OF RESPONDENT AMBAC INDEMNITY CORPORATION IN OPPOSITION

Respondent AMBAC Indemnity Corporation respectfully submits that the Petition for Writ of Certiorari seeking review of the judgment and opinion of the Supreme Court of Georgia in this case should be denied.

OPINIONS BELOW

Contrary to petitioners' statement, the opinion and judgment of the Supreme Court of Georgia and its order denying reconsideration are officially reported as *AMBAC Indemnity Corp. v. Akridge*, 262 Ga. 773, 425 S.E.2d 637 (1993).

JURISDICTION

Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1257(a). Respondent submits that jurisdiction does not lie under this statute, because petitioners did not raise, and the Supreme Court of Georgia did not decide, any federal question.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners cite Section 1 of the Fourteenth Amendment to the United States Constitution as a constitutional provision involved in this case. However, nowhere in the proceedings below did petitioners invoke the Fourteenth Amendment or its Due Process Clause as a basis for the relief sought, nor did the Supreme Court of Georgia rest any part of its judgment or opinion on the Fourteenth Amendment or decide any question involving the interpretation or application of the Fourteenth Amendment.

On the other hand, petitioners omit the following provisions of Georgia law, which formed the basis for the Georgia Supreme Court's decision:

Article IX, section III, paragraph I of the Georgia Constitution provides in pertinent part:

> **Paragraph I. Intergovernmental contracts.**
>
> (a) The state, or any institution, department, or other agency thereof, and any county, municipality, school district, or other political subdivision of the state may contract for any period not exceeding 50 years with each other or with any other public agency, public corporation, or public authority for joint services, for the provision of services, or for the joint or separate use of facilities or equipment; but such contracts must deal with activities, services, or facilities which the contracting parties are authorized by law to undertake or provide.

Ga. Const. art. 9, § 3, ¶ 1.

Article IX, section II, paragraph III of the Georgia Constitution provides in pertinent part:

> **Paragraph III. Supplementary powers.**
>
> (a) In addition to and supplementary of all powers possessed by or conferred upon any county, municipality, or any combination thereof, any county, municipality, or any combination thereof may exercise the following powers and provide the following services:

. . .

(2) Garbage and solid waste collection and disposal.

Ga. Const. art. 9, § 2, ¶ 3.

Section 36-63-8(a)(5) of the Official Code of Georgia Annotated provides in pertinent part:

36-63-8. Powers of authority generally.

. . . [A]uthority is specifically granted to municipal corporations and counties and to the [resource recovery development] authority to enter into contracts, lease agreements, or other undertakings relative to the furnishing of project activities and facilities or either of them by the authority to such municipal corporations and counties and by such municipal corporations and counties to the authority for a term not exceeding 50 years.

O.C.G.A. § 36-63-8(a)(5) (Michie 1987).

Article IX, section VI, paragraph IV of the Georgia Constitution provides:

Paragraph IV. Validation.

The General Assembly shall provide for the validation of any revenue bonds authorized and shall provide that such validation shall thereafter be incontestable and conclusive.

Ga. Const. art. 9, § 6, ¶ 4.

Section 36-82-78 of the Official Code of Georgia Annotated provides:

> **36-82-78. Proceeding for validation of revenue bonds -- Effect of judgment of validation.**
>
> If no appeal is filed within the time prescribed by law or if an appeal is filed and the judgment is affirmed on appeal, the judgment of the superior court confirming and validating the issuance of the bonds and the security therefor shall be forever conclusive against the governmental body upon the validity of such bonds and the security therefor.

O.C.G.A. § 36-82-78 (Michie 1987).

STATEMENT OF THE CASE

Pursuant to a resolution adopted on November 11, 1988, the Berrien County Resource Recovery Development Authority issued $2,000,000 in revenue bonds for the purpose of financing a resource recovery system for Berrien County, Georgia. As specifically authorized by the intergovernmental contracts clause of the Georgia Constitution, Ga. Const. art. 9, § 3, ¶ 1, and the Resource Recovery Development Authorities Law, O.C.G.A. § 36-63-8(a)(5), payment of the bonds was secured by a contract between the authority and Berrien County. Under the contract, the county, in consideration of the services provided by the authority, agreed to make payments to the authority to enable it to pay any deficiency between its revenues and the

amount required to pay the principal of and interest on the bonds.

In accordance with Georgia's Revenue Bond Law, O.C.G.A. §§ 36-82-60 *et seq.*, prior to issuance of the bonds, the local district attorney instituted validation proceedings in the Superior Court of Berrien County. Pursuant to O.C.G.A. § 36-82-76, the public was notified that a hearing would be held on December 1, 1988, at which the superior court would pass upon the validity of both the bonds and the contract, and that any citizen who objected had the right to intervene and become a party to the proceeding. No person intervened or filed an objection.

Following the hearing, the superior court entered an order confirming and validating the bonds and the contract.[2] Among other things, the superior court held that the published notice of the validation hearing complied with the requirements of Georgia law (App. 4a), and that Georgia law authorized the county to enter into the contract with the authority and to pledge its taxing power to fulfill its obligations thereunder. (App. 3a.) Relying on the validation order, respondent AMBAC Indemnity Corporation issued a municipal bond insurance policy insuring payment of the bonds.

Nearly three years later, petitioner Bobby C. Akridge, Sr., filed this action against the Berrien County Board of Commissioners and the Berrien County Tax Commissioner alleging that the contract was invalid and unenforceable on various state law grounds. (Pet. App. 20-23.) Akridge did not challenge the sufficiency of the notice of the

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[2]The superior court's validation order is reproduced in full in the Appendix to this Brief.

bond validation hearing, nor did he attack the constitutionality of O.C.G.A. § 36-82-76, pursuant to which the notice had been published. Nowhere in Akridge's complaint, or in a subsequent amendment, was any claim made that there had been a violation of "due process." Nor was any reference made to the Due Process Clause of the Fourteenth Amendment to the U. S. Constitution or to any other provision of federal law.

On July 29, 1992, the trial court entered an order granting the declaratory and injunctive relief sought by Akridge. (Pet. App. 9-19.) Without any analysis of federal due process principles or any reference to the Due Process Clause of the Fourteenth Amendment, the trial court concluded, *inter alia*, that "proper notice [of the validation hearing] was not given," and consequently, that "[d]ue process was denied." (Pet. App. 15-16.) AMBAC, which had intervened in the action as a party defendant, appealed to the Georgia Supreme Court.

On appeal, Akridge argued that giving the validation order *res judicata* effect "would be a denial of due process" but did not cite or discuss federal due process requirements. (Pet. App. 28.) The brief of *amicus curiae* Georgia Center for Law in the Public Interest characterized the case as presenting "a challenge to the adequacy of the political subdivision's compliance with *statutory* notice requirements," and argued that the published notice of the bond validation hearing "failed to comply with the due process requirements of O.C.G.A. §§ 36-82-76 *et seq.*" (Pet. App. 36.) (Emphasis supplied.)

The Supreme Court of Georgia reversed the trial court, holding that "[b]ecause the validation proceedings followed the statutory procedure, the superior court's valida-

tion order of December 1, 1988, is conclusive on the validity of the contract between the county and authority." (Pet. App. 4.) In reaching this conclusion, the court held that the published notice of the validation proceedings "satisfied the constitutional requirement of due process by giving residents and taxpayers adequate notice of the subject of the hearing and of their opportunity to be heard." (Pet. App. 3.) Nowhere in its opinion did the court refer to the Due Process Clause of the Fourteenth Amendment or discuss federal due process principles.

In a separate division of its opinion, the Supreme Court of Georgia also held that the agreement between the County and the Authority was a valid intergovernmental contract specifically authorized by the Georgia Constitution and statutes. As such, the court concluded, "it does not constitute a debt in violation of the constitutional clause limiting local debt." (Pet. App. 6.)

Akridge filed a motion for reconsideration, and for the first time in the case raised a claim under the U. S. Constitution. Akridge argued that "[d]ue process under the Fifth Amendment to the United States Constitution, and under our Georgia Constitution, required that such [additional] notice be given." (Pet. App. 39.) The Supreme Court of Georgia summarily denied Akridge's motion without addressing the newly raised federal constitutional issue. (Pet. App. 8.)

Akridge then filed his Petition with this Court seeking review of the question whether the local government's actions in this case violated the Due Process Clause of the Fourteenth Amendment to the U. S. Constitution.

SUMMARY OF ARGUMENT

The federal constitutional question as to which petitioners seek certiorari was never properly raised or decided in the state courts. Petitioners' complaint in the trial court contained no allegation of a violation of due process or any reference to the Due Process Clause of the Fourteenth Amendment to the U. S. Constitution. Petitioners' briefs in the state courts contained vague allegations of a denial of due process, but no reference was made to the U. S. Constitution or to the Due Process Clause of the Fourteenth Amendment. Such statements in briefs cannot support a claim of jurisdiction in this Court and in any event were too vague to raise a federal, as opposed to a state, constitutional claim. Petitioners did not explicitly raise a federal due process claim until their motion for reconsideration in the Georgia Supreme Court, which the court summarily denied without referring to or addressing the issue, thus providing no basis for this Court's jurisdiction to review the question. Finally, petitioners concede that the Supreme Court of Georgia did not decide the federal due process issue that they now seek to raise. For all these reasons, this Court lacks jurisdiction under 28 U.S.C. § 1257(a).

Even if the federal due process issue had been properly raised or decided, jurisdiction in this Court would be lacking, because the Georgia Supreme Court's judgment was based on an independent and adequate state law ground. In its opinion, the Georgia Supreme Court held, *inter alia*, that Georgia law specifically authorized the contract challenged by petitioners, and that the contract did not contravene state constitutional debt limitations, as petitioners contended. Consequently, even if the court had addressed the federal due process issue and had (as petitioners contend)

erroneously decided that federal due process requirements were satisfied, its judgment would still stand on the independent state law ground that the contract was not subject to the legal objections petitioners sought to raise. In other words, even if petitioners had received the notice to which they claim they were entitled and had intervened in the bond validation proceeding, the contract between the county and the authority that they sought to have set aside would have been upheld on the basis of well-established Georgia law. Accordingly, no federal question is properly presented for this Court's review.

Contrary to petitioners' contention, there is no conflict between the Georgia Supreme Court's decision in this case and the Michigan Supreme Court's decision in *Alan v. County of Wayne*, 388 Mich. 210, 200 N.W.2d 628 (1972). In the latter case, the court held that Michigan law, unlike Georgia law, prohibits a county from pledging its taxing power to secure the payment of revenue bonds. The county nevertheless sought to make such a pledge, and the court therefore held that both the bonds and the notice of their issuance were illegal. By contrast, under Georgia law, as held by the Georgia Supreme Court in this case based on a long line of earlier decisions, a county may enter into a contract with an authority in which it pledges its taxing power to secure the payment of the authority's revenue bonds. Thus, the different outcomes in these two cases were entirely the result of fundamental differences in state law and not because of any difference in the courts' views of federal due process requirements. Therefore, the purported "conflict" between these decisions presents no issue for this Court's review.

REASONS FOR DENYING THE WRIT

I. No Federal Question Was Raised or Decided in the State Court Proceedings

It is essential to this Court's jurisdiction under 28 U.S.C. § 1257(a) that a substantial federal question was either properly raised or decided in the state court proceedings. *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). Petitioners seek consideration of the question whether a local government unit's issuance of certain revenue bonds violated the Due Process Clause of the Fourteenth Amendment to the U. S. Constitution. (Pet. i.) This issue, however, was never presented to or decided by the state courts below.

Petitioners' complaint challenged the validity of the local government unit's actions on purely state law grounds. (Pet. App. 20-23.) Petitioners asserted no claim that their due process rights had been violated. Nor did they challenge the constitutional validity of the Georgia statute in accordance with which notice of the bond validation hearing was published.[3] Indeed, nowhere in petitioners' complaint is there any reference whatsoever to "due process," much less any specific claim under the Fourteenth Amendment to the U. S. Constitution.

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[3]Under Georgia law, such a challenge would have required petitioners to notify the Georgia Attorney General by serving him with a copy of their complaint and giving him an opportunity to be heard on the issue. O.C.G.A. § 9-4-7(c). No such notice was given in this case. Therefore, even if petitioners had attacked the constitutionality of the notice statute, the state courts would have been without jurisdiction to address the issue. *Williams v. Kaylor*, 218 Ga. 576, 129 S.E.2d 791 (1963).

On appeal, petitioners argued in their briefs that enforcement of the superior court's validation order against them "would be a denial of due process." (Pet. App. 28.) However, such statements in briefs cannot be used to sustain a claim of jurisdiction to decide a federal question, where the record discloses that the federal claim was never asserted in the proper manner in the state courts. *Lynch v. New York ex rel. Pierson*, 293 U.S. 52, 54 (1934); *Live Oak Water Users' Ass'n v. Railroad Comm'n*, 269 U.S. 354, 358-59 (1926).

Moreover, petitioners' arguments were not supported by any reference to the U. S. Constitution in general or the Due Process Clause of the Fourteenth Amendment in particular. A mere allegation of a denial of due process, without any reference to the U. S. Constitution or claim of rights thereunder, "does not of itself raise a Federal question with sufficient distinctness to give us jurisdiction to consider whether there has been a violation of the 14th Amendment of the Constitution." *Thomas v. Iowa*, 209 U.S. 258, 263 (1908). Indeed, where, as here, the state constitution also has a due process clause, Ga. Const. art. 1, § 1, ¶ 1, "such an averment, making no reference to the Constitution of the United States, and asserting no express rights thereunder, is solely referable to the state Constitution, . . . and affords no basis whatever for invoking the jurisdiction of this court." *Bowe v. Scott*, 233 U.S. 658, 665 (1914).

Petitioners explicitly raised a federal due process claim for the first time in their motion for reconsideration addressed to the Supreme Court of Georgia. (Pet. App. 39.) (Even then, petitioners mistakenly referred to the Fifth, rather than the Fourteenth, Amendment.) It is well settled that an attempt to raise a federal question for the first time in a petition for rehearing addressed to the highest state

court comes too late, unless the court actually entertains the petition and expressly decides the question. *Herndon v. Georgia*, 295 U.S. 441, 443 (1935). In this case, the Georgia Supreme Court summarily denied petitioners' motion for reconsideration without addressing the federal due process issue. (Pet. App. 8.) Such a summary denial provides no basis for jurisdiction in this Court over the federal question that petitioners belatedly sought to raise. *See McCorquodale v. Texas*, 211 U.S. 432, 436-37 (1908).

Even though petitioners never properly raised a federal due process claim, this Court would still have jurisdiction to consider the issue if the Supreme Court of Georgia had nevertheless reached and decided it. *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974). However, petitioners themselves acknowledge that "[t]he Supreme Court of Georgia's analysis fails to address the issues implicated by the due process clause." (Pet. 12.) Indeed, petitioners complain that the Supreme Court of Georgia focused on compliance with statutory notice requirements and ignored constitutional due process principles. (Pet. 11-12.) This complaint rings somewhat hollow given petitioners' own failure to raise the federal due process issue. Nevertheless, it does serve to establish petitioners' admission that the Supreme Court of Georgia did not address or decide the issue.

Petitioners pursued their claims in state court asserting purely state law claims. Once the Supreme Court of Georgia had rejected these state law claims, petitioners sought to raise a federal due process claim for the first time. This attempt was summarily rejected by the Georgia Supreme Court, and petitioners now ask this Court to review this newly raised issue, which was never properly presented to or decided by the state courts. In the words of Justice

Holmes, writing for the Court in *Osborne v. Clark*, 204 U.S. 565, 569 (1907):

> If a case is carried through the state courts upon arguments drawn from the state Constitution alone, the defeated party cannot try his chances here merely by suggesting for the first time when he takes his writ of error that the decision is wrong under the Constitution of the United States.

The writ should be denied for lack of jurisdiction.

II. The Georgia Supreme Court's Decision Rests Upon An Independent and Adequate State Law Ground

Even if the Supreme Court of Georgia had addressed the federal due process issue and had (as petitioners contend) erroneously decided that federal due process requirements were satisfied in this case, its judgment would still not be subject to review by this Court, because it is also based on an independent and adequate state law ground. *See Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945).

Petitioners argue that had they been given proper notice, they "could have intervened in the bond validation proceeding and objected to the so-called 'revenue bonds' as the 'back door general obligation bonds' that they were." (Pet. 14.) The Supreme Court of Georgia's opinion makes clear, however, that even if petitioners had intervened, their objections would have been rejected on the basis of well-established Georgia law.

In division 3 of its opinion, the Supreme Court of Georgia held that the constitution and laws of Georgia specifically authorized the contract between the county and the authority, the validity of which petitioners challenged. (Pet. App. 5-6.) Citing its landmark decision in *Sheffield v. State School Bldg. Auth.*, 208 Ga. 575, 581, 68 S.E.2d 590, 595 (1952), the court further held that the contract between the county and the authority, under which the county pledged its taxing power to assist the authority in paying off the bonds, did not constitute a debt in violation of state constitutional limitations, as petitioners had contended. (Pet. App. 6.)

Thus, the Supreme Court of Georgia's judgment rests on two independent and equally adequate grounds. First, the court held that the bond validation order was *conclusive*, because it had been rendered in accordance with all the procedural requirements of Georgia law, including the requirement of public notice. (Pet. App. 2-5.) Second, the court held that the bond validation order was *correct*, because Georgia substantive law specifically authorized the county to enter into the contract with the authority and to pledge its taxing power to fulfill its obligations under the contract. (Pet. App. 5-6.) Even if, as petitioners contend, the court's first holding were based on an erroneous finding that federal due process requirements were satisfied, the court's judgment would still stand on the basis of its second holding, which recognized *as a matter of Georgia law* that the bonds and the contract were valid and enforceable and not subject to the objections petitioners would have raised had they intervened in the validation proceedings.

Therefore, even if petitioners' due process argument had merit (which respondent denies), the same judgment would be rendered by the Georgia Supreme Court on

independent state law grounds. This Court's "power is to correct wrong judgments, not to revise opinions." *Herb v. Pitcairn, supra*, 324 U.S. at 126. Accordingly, the writ should be denied.

III. The Georgia Supreme Court's Decision Does Not Conflict with the Michigan Supreme Court's Decision in *Alan v. County of Wayne*

Petitioners contend that review of this case is justified because the Georgia Supreme Court's decision conflicts with the decision of the Michigan Supreme Court in *Alan v. County of Wayne*, 388 Mich. 210, 200 N.W.2d 628 (1972). Petitioners, however, ignore a fundamental distinction between the two cases.

In *Alan v. County of Wayne*, the Supreme Court of Michigan held that Michigan law *prohibited* the county from pledging its taxing power to secure the payment of revenue bonds issued by the stadium authority. 200 N.W.2d at 656. According to the court, such a pledge of the county's full faith and credit constituted an "indebtedness" within the meaning of the provision of the Michigan Constitution limiting the amount of "any indebtedness" that a county could incur. *Id.* at 676. Consequently, the court held that the bonds were illegal under Michigan law. *Id.* at 699-700.

In this case, on the other hand, the Supreme Court of Georgia, in accordance with a long line of earlier decisions, held that the Georgia Constitution and statutes specifically *authorized* the county to enter into the contract with the authority, under which it pledged its taxing power to secure payment of the bonds. Such a pledge, according to the Georgia Supreme Court, did *not* constitute a debt within the meaning of the Georgia constitutional provision limiting

local debt. (Pet. App. 6.) Consequently, the contract was a legally valid and binding obligation of the county. *Id.*

Thus, Georgia and Michigan law are diametrically opposed with respect to the legality of the type of revenue bond at issue here. Since, under Michigan law, the county was not permitted to secure payment of the bonds by pledging its taxing power, the court found that the notice of intent to issue the bonds was "misleading" because it failed to disclose this legal defect. 200 N.W.2d at 697. In this case, on the other hand, the contract between the county and the authority was specifically authorized by Georgia law. Moreover, in accordance with statutory notice requirements, the public was informed that the county and the authority intended to enter into a contract relating to payment of the bonds, and that any objections to the contract could be raised at the bond validation hearing. Under these circumstances, in contrast to the very different legal context present in the Michigan case, the Georgia Supreme Court found that adequate notice had been given.

Hence this case and *Alan v. County of Wayne* do not present opposing interpretations of federal due process requirements. Instead, their different outcomes are simply the result of fundamental differences in the governing state law. Since these decisions present no conflict with respect to any issue of federal law, they provide no basis for this Court's review of the Georgia Supreme Court's decision. Accordingly, the writ should be denied.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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